IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. [redacted] /

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

ANSWER TO MOTION (AMENDED) TO REMAND (AND APPENDICES.)

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents-Cross Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 9 and 10.

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

ANSWER TO MOTION (AMENDED) TO REMAND.

The Solicitor General's blandly stated Motion to Remand to the trial court so that additional evidence, some old but not heretofore "appreciated" and some assertedly new, may be spliced onto that taken in a 1952 pre-trial suppression hearing, all in an effort to bolster a conviction obtained in 1953 and reversed in 1955, masks a multiplicity of legal and factual perversions. Many of them are not ap-

parent from the scanty statements of the Motion. We do not believe that any motion by the Solicitor General, no matter how ill-founded we believe it to be, can be regarded lightly. For these reasons we reply to it at some length, perhaps thereby giving it more color than it deserves.

The Motion is wrong in its basic procedural and substantive legal premises; its incorrect factual showing is mere hearsay and conclusory rather than direct and competent; lack of diligence is apparent; even if the Motion were sound, it is presented to the wrong court. It, and the petition for certiorari, should be denied. It is made against the following background:

BRIEF STATEMENT OF CASE.

Defendants, respondents to the instant motion, were indicted in 1952 for alleged falsities in the income tax returns of Shotwell Mfg. Co. (now named Homan Mfg. Co.), for 1945 and 1946. They asserted, by motion to dismiss, immunity from prosecution because in February 1948, in reliance upon repeated promises of immunity from criminal prosecution by the Treasury to those who voluntarily disclosed irregularities before investigation was initiated, they had voluntarily disclosed such to Ernest J. Sauber, then Chief Deputy Collector (subsequently District Director of Internal Revenue in Chicago). It was held by the District Court, and subsequently by the Court of Appeals, that the promised immunity was not judicially enforceable.

Defendants then moved to suppress evidence they had produced in reliance on the promise of immunity.[1] Evidence taken on this motion showed that the disclosure, which was wholly oral as permitted by Treasury pronounce-

1. It is conceded by the Petition for Certiorari to this Court that if the disclosure was a good one defendants were entitled to a suppression order (Pet. p. 17).

ments,[2] was participated in by only three persons: Leon Busby, Shotwell's auditor, Byron Cain, its president, and Sauber. They all testified and fixed the disclosure as occurring in January-March 1948; they agreed that Shotwell, at the time of the disclosure, confessed it did not have records and figures from which to prepare correct returns, and that such data would have to be assembled (R. 178, 202, 229, 231-3, 283, 284, 286) for use of a Revenue Agent who from it and other records would "audit" the company and assist in making a correct return. It was assembled and then was summarized in "recapitulations" (Def. Ex. 1, R. 3091 *et seq.*) which were furnished Agent Lima when he started his audit, in response to the disclosure, on, or shortly after, July 30, 1948.

At the suppression hearing the Government contended the evidence was admissible because the disclosure was invalid for two reasons: (a) Untimely, because the 1946 return had been "assigned" for audit on December 16, 1947 which date was contended to mark the "commencement of investigation" (R. 440-1, 445). The assignment contention proved to be without factual support and it is no longer contended that December 16, 1947 is the timeliness date (see note 3, *post*). (b) Insufficient, because after disclosure defendants did not supply sufficient information. The District Court adopted this latter theory; the Court of Appeals rejected it.

Now it is the Government's contention, contrary to its

2. "There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the Government whole', would constitute a complete disclosure." (Treasury release of May 14, 1947, R. 3136.) Note also that the supplying of data or cooperation in determining the true tax liability, if required at all, is in the nature of a condition subsequent to the disclosure. The disclosure itself was the act of disclosing oneself as a possible violator and inviting the Bureau to make an examination.

position in the District Court and the Court of Appeals, that "conceivably" no disclosure was made until after June 21, 1948; that this was too late to be timely because on June 21 the Government got a clue or "scent" which ultimately would have led to an independent investigation had no disclosure been made.

If it be assumed that a disclosure in July would have been untimely (which is not the case), the fact remains that neither Busby, Cain nor Sauber, the only participants to the disclosure, have recanted or changed their testimony as to disclosure in the January-March period. Nor is any contradiction of trial testimony claimed—only that the Government had evidence at the time of the hearing (which it did not use), and asserts it now has (but does not display) supplementary evidence, from which it is contended inferences inconsistent with a disclosure in the January to March 1948 period "conceivably" may be drawn.

SUMMARY OF REASONS FOR DENIAL OF MOTION.

1. In a criminal case the Government may not, after trial on the merits, move for a partial new, or additional trial of a suppression of evidence hearing, in an attempt to validate the hearing on the merits.

2. A new trial on the ground of newly discovered evidence is never given merely because such evidence "*might conceivably alter*" the result, all that is claimed here (Mo., p. 5), but only where it reasonably can be asserted that the evidence is so important and material that it will probably produce a different result.

3. The Motion is based on a new, incorrect and radically changed *legal theory*, not open to the Government on review, namely that the Revenue Service's act of inspecting certain of *this* taxpayer's records while in the course

of investigating *another* taxpayer gave them a possible "scent" as to this taxpayer which would constitute legal "initiation" of an investigation of this taxpayer and would make a disclosure subsequent thereto "untimely:"

Such a legal theory was expressly disavowed in the trial court where the Government correctly conceded that the "timeliness" date, under the Treasury's voluntary disclosure doctrine, was to be determined by the Treasury's "objective" test of (a) when the taxpayer's return was actually assigned for audit, or (b) when an investigating officer requested advice (R. 440-1, 445).[3] The Government initially believed the assignment for audit, and hence the timeliness, date was December 17, 1947; however, the proof showed, without contradiction, that the Shotwell return was not then assigned for audit but merely for "survey" as to whether it should be audited (R. 393-6).

3. Government counsel have attempted to slide away from the "objective" test for determining "initiation of investigation", to change their basic *legal* as well as factual theory, without informing the Court they are doing so. They premise their motion on the legal theory that if someone in the Revenue Service picks up the name of B while investigating A, that *ipso facto* the Service has "initiated" an investigation as to B and any subsequent disclosure by him is invalid. No such theory was presented below. Counsel misapprehend a sentence in the Court of Appeals opinion which we quote below (emphasis ours):

> "When the revenue agents get the scent *and are in pursuit* of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy."

Counsel show that on June 21, 1948 New York agents, investigating Lubben of New York, requested Chicago agent Krane to check information on Lubben by examining certain of Shotwell's books as to its dealings with him. They argue that this gave the agents the "scent" as to possible violations by Shotwell. There is no utterly factual basis for this argument because the agents got no "scent" from Krane's visit of June 21. What happened was that Close & Co., of Chicago, which had also dealt with Lubben, made a disclosure on August 20, 1948, that came to the attention of Intelligence Agents in Chicago. On August 31, the Chicago Intelligence Office, which was unaware that the Shotwell disclosure had been made and

No investigation of this taxpayer, independent of the one flowing from, or in verification of, the disclosure and which was commenced by assignment to Revenue Agent Lima on July 30, 1948 (Dft. Ex. 15, R. 3173), ever was commenced. There are indications that an independent investigation, flowing from clues picked up in the Close & Company revelations in late August 1948, (not from the asserted Krane clue of June 21), *might have been initiated* in late September 1948 (R. 3167). But by that time there is no dispute but that Chicago Agent Lima's examination in verification of the disclosure was well under way and the idea of an independent investigation was dropped. No step inconsistent with full recognition of a valid disclosure was taken until September 19, *1950*, when agents in the Intelligence Unit requested that a "case jacket be issued," *not because the disclosure*

---

that Agent Lima actually was at work checking on it, wrote to the New York Intelligence Office, suggested that "possibly similar over-invoice payments were received by Shotwell * * * from Lubben," and requested it to make appropriate inquiries of Lubben. New York replied on September 13, 1948, that it was informed that Shotwell had made a disclosure to the Revenue Agent's office in Chicago. Chicago Intelligence Agents then made inquiry of the Internal Revenue Agent in Charge in Chicago and found that Lima already was conducting his examination (See Agent Krane's report at R. 3166-7). Thus the present hindsight speculation that the Treasury obtained a "scent" on June 21, 1948, is contrary to the Treasury's own record.

But in any event "scent" is not enough. Even in the graphic and non-technical language of the foregoing quotation, the test is stated in the conjunctive, "scent" *and* "pursuit." Unless the agents were "in pursuit," *i.e.*, had actually commenced an investigation, a taxpayer could still disclose. Even the Motion to Remand admits a disclosure at least as of late July 1948. The record shows, as we demonstrate in the text, that no investigation that can in any way be said to be independent of that precipitated by the disclosure and requested by defendants was ever initiated. The new theory thus would not invalidate the suppression order even if counsels' factual assumptions be accepted. (This note is no retreat from our position that the disclosure occurred in January-March 1948.)

had been untimely, but solely because Shotwell's officers allegedly "refused to identify the recipients" of Shotwell's over-ceiling disbursements for which it was not going to be allowed tax deductions (R. 3172).

The new theory that a disclosure in July 1948 would have been untimely is fruitless because no investigation had then been "initiated" within the admitted Treasury definition of that term.

4. The evidence is not new. The Motion concedes (p. 3) that much (we believe virtually all), of it had been considered in 1952 and 1953 but was not "appreciated." The Motion emphasizes that Chicago Agent Krane visited the Shotwell plant on June 21, 1948, and that Shotwell's controller, Graflund, telephoned its president, Cain, at a candy convention in New York, about the visit. This call, and Cain's reaction to it, were gone into on the suppression hearing in 1952 (R. 269-270) and the hearing on the merits in 1953 (R. 2614-5, 2559, 2679). The questioning demonstrated that one Daniel Tobias had heard defendant Cain's end of the conversation (R. 2614-15); Agent Krane heard Graflund's end. Cost records in the District Court show that Tobias was under subpoena and was paid $172.12 witness fees from November 10 to 14, 1952 (suppression hearing), and was under subpoena and was paid witness fees of $398.24 from September 17 to 27 and October 10 to 14, 1953 (trial), but neither he nor Agent Krane was placed on the stand.

The Motion makes much of the 4 to 5 month interval between the disclosure and the making of "summaries" or "recaps" of the Lubben account, seeking to create the illogical inference that because the summaries were not prepared until July 1948, no disclosure was made in January-March 1948. There is nothing new about the fact that the summaries were not made until July: When

defendants made the disclosure they said they had no figures; that they would have to reconstruct them (R. 178, 202, 229, 231-3, 283, 284, 286, 2564, 2570, 2577, 2590). In testifying with respect to one of the final summary sheets, defendant Cain put it this way: "We had made our disclosure *months and months and months before this sheet was put out*" (R. 259). At the trial it was again clear that the data ultimately compressed into the summary sheets (Dft. Ex. 1 etc., Suppr. hrg., R. 3091, *et seq.*) was assembled "over a period of months" (R. 2585, 2590). Although no point was made by either side as to the precise date on which the summary sheets were prepared, it was clear that it had to be sometime in July 1948 because the testimony was that defendants were assembling underlying data and information during March, April, May and June (R. 2577); Busby testified he was still compiling data in June (R. 187), and as late as July 9, Cain was still trying to get confirmatory figures from Lubben's books through Tobias (R. 2616).

5. The Motion is not supported by the affidavits of the purported witnesses, who in some instances are in no way identified, but only by the hearsay statements and argumentative conclusions of interested lawyers and a detective.

6. If a motion by a prosecutor for a partial new trial can be countenanced in any court it should have been made to the Court of Appeals and not here. *First*, this Court has not taken jurisdiction; *Second*, it is established practice that motions on grounds of evidence theoretically discovered after a Court of Appeals decision, even after application for certiorari has been made here, go initially to that Court for a determination of whether there is a prima facie showing that warrants a change in its mandate and remandment to the District Court. (*U. S.* v. *Johnson*,

142 F. 2d 588, 589, C.A. 7, reciting action of this court sending the case back to the Court of Appeals; see also recitals in this Court's subsequent opinion in the same case at 327 U. S. 106. Contrast that case and this with *Mesarosh v. U. S.*, No. 20 this term, in which, after this Court had taken jurisdiction, both sides agreed that there was tainted testimony by a prosecution witness and that there should be a further inquiry.)

HISTORY OF THIS CASE AND RELATED PROCEEDINGS.

Voluntary disclosure of irregularities in Shotwell's 1945-6 income tax returns was made in the spring of 1948. Indictment was returned March 14, 1952 (R. 5). On November 21, 1952, the District Court, after hearing, denied respondents' Motion to Suppress Evidence (R. 447). The hearing on the merits, in September and October 1953, resulted in convictions.

Appeal was taken to the Seventh Court of Appeals where oral argument did not take place until May 3, 1955. On June 15, 1955, the Court of Appeals reversed and remanded on the ground that the District Court erred in failing to suppress evidence furnished in reliance on the Government's promise of immunity. The Court did not pass on other important errors urged as to the hearing on the merits. Petition by the Government for rehearing was not filed in the Court of Appeals until July 30, 1955. It contained no hint of the matters now asserted.

Petition for Certiorari was filed October 17, 1955. Although this Court has not yet taken jurisdiction of the case, no motion has been made in the Court of Appeals calling its attention to the matters that are claimed to warrant modification of its mandate.

On December 6, 1955, the Solicitor General wrote to the

Clerk of this Court and adopted representations of the Internal Revenue Service dated December 1, 1955, charging that Government witnesses Busby and Sauber, with respondent Cain, had given testimony that "was false in material and vital aspects." The letter said the Government expected to file a motion to remand to the District Court "at an early date" and requested that action on the certiorari application be withheld.

Before this letter was sent, Director Sauber, on December 2, 1955, was placed on administrative leave by the Internal Revenue Service. Departmental charges were filed against him, including one charging perjury in this case and reciting many other claims that are at least partially reflected in the hearsay affidavits here (App. I). He was suspended on March 2, 1956, and administrative hearings followed. We assert that those hearings exonerated him of any wrongdoing in connection with this case *because, after hearing, no administrative finding of any wrongdoing herein was made.* (Cf. *Jolly* v. *U. S.*, 170 U. S. 402, 408; *Selvester* v. *U. S.*, 170 U. S. 262, 267; *Dealy* v. *U. S.*, 152 U. S. 539, 542.) The order there was removal from office on wholly distinct and admittedly "unrelated charges" on August 6, 1956 (Footnote 4 to Mo. to Remand).

In the meantime, in February 1956, the Treasury importuned the Justice Department to commence a new grand jury investigation involving, among other things, the asserted claim of perjury in this case. The grand jury investigation commenced in April 1956 and is still continuing.[4] No indictments have yet been issued.

4. This grand jury investigation is referred to in footnote 4 of the Motion to Remand. It has resulted in two proceedings to restrain believed improper use of grand jury process:

In the first of these, *Homan* v. *Russo, et al.*, 233 F. 2d 547 (C. A. 7, May 11, 1956), it was held (a) that the grand jury could

On June 1, 1956, the Solicitor General again wrote to this Court and requested that this case be held over the term because "evidence sought to be adduced before the Grand Jury *may*, in the opinion of the Department, have important bearing on whether perjury was committed in the trial [sic] of the case." Apparently such evidence has not been forthcoming because the records of the District Court reveal no motion by the prosecutors under Criminal Rule 6 to have it made available to this Court.

As the matter now stands, Sauber has been exonerated of perjury in administrative hearings and the prosecutors thus far have been unable to come up with enough evi-

---

subpoena documents that were ordered to be suppressed in the main case, and (b) that allegations that the prosecutors proposed to divert subpoenaed material from the exclusive use of the grand jury to that of unauthorized persons were not sufficiently pleaded.

In the second proceeding, *In the Matter of the April 1956 Term Grand Jury*, C. A. 7, November 13, 1956, Appendix II hereto, the Court held that it would in no way interfere with the scope of grand jury inquiries for purposes of alleged criminal investigations but that sufficient showing was made that voluminous material, theoretically subpoenaed for the jury's use, was actually being diverted to Treasury agents for civil or collateral purposes and that such use should be restrained.

In the proceedings last referred to, Vincent P. Russo, the principal affiant in support of the present motion, argued the matter to the Court of Appeals. In so doing he misrepresented facts to such extent that on November 2, 1955, the Justice Department filed a motion with that Court in which it said:

> "The Government admits and sincerely regrets that certain misstatements of fact were made to the Court on oral argument [by Mr. Russo] on October 17, 1956. The Department of Justice desires to make a full and accurate correction of the record, and the matter is under consideration by the Assistant Attorneys General in charge of the Criminal and Tax Divisions."

In the light of that record, Mr. Russo's ability to make fair and accurate digests, appraisals and summaries of alleged statements of alleged potential witnesses, as he purports to do here, may be doubted. The requirement that the actual affidavits of the prospective witnesses be produced rather than a lawyer's version of what he thinks witnesses might say, has significant impact here.

dence to warrant an indictment of Sauber, Busby or Cain for anything.[5] The claim now is merely that "had the evidence now available been presented [originally] * * * the rulings * * * *might conceivably have been altered*" (Mo., p. 5).

While the foregoing proceedings were going on, the Treasury, on September 15, 1955, made a jeopardy assessment against respondent Shotwell (Homan) claiming $3,172,000 in taxes, penalties and interest for the years 1944-45-46. Of this, $1,036,000 was asserted for taxes for the years 1945 and 1946, as contrasted with the $286,000 tax deficiency asserted here for those years.

Respondent Shotwell (now named Homan Mfg. Co., Inc.), proceeded in the District Court for an injunction against collection of this assessment on the ground it was arbitrary and capricious. A deposition was taken from Revenue Agent Charles J. Mammel, who made the $3,172,000 assessment, and who necessarily is the Revenue Agent whose opinions and complaints are referred to, or paraphrased, in the Stein affidavit, Ex. A to the present Motion. On June 14, 1956, the District Court, acting on the deposition and other evidentiary material, entered a summary judgment holding that the assessment was "patently arbitrary, capricious and wholly void" (App. III). It found:

> "11. Mammel's determinations were arbitrary, capricious and unlawful in the extreme and it is not necessary to decide whether such actions sprang from malice, incapacity, or a desire to justify the length of time and large amounts of manpower consumed in this investigation, or from a combination of these or other reasons. Mammel suffered a complete mental breakdown on March 19, 1953 and upon cross-examination in February 1956 was unable to recall

5. Even if an indictment charging some crime had been, or should be returned, it would have no evidentiary standing in this case. (*Brinegar* v. *U. S.*, 338 U. S. 160, 173.)

basic rules of taxation involved in this case and which should have come into play when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair judgment in making the 1955 assessment."

A significant fact thus emerges after more than 8 years of Treasury examinations: all of the Government attorneys and revenue agents who, from 1948 through the trial of the case interviewed the witnesses and worked on the case, believed that the witnesses pro and con who testified on the suppression hearing told the essential truth as to the disclosure. (See Howard affidavit, Ex. C., Mo. to Remand.) There were minor, immaterial differences that are the hallmark of honest, as distinguished from rigged, testimony. But in late 1954, an embittered Revenue Agent (Maumel), of questionable mental balance and who subsequently entered an assessment that violated elementary concepts of due process, submitted critical reports and set in motion the train of events that has ended in the instant unprecedented motion. The unanimity of opinion by those who prepared and tried the case that Sauber, Busby and Cain told the essential truth is strong evidence that they did precisely that.

AMPLIFICATION OF REASONS FOR DENIAL OF MOTION

I.

The Government cannot move for a partial new trial in order to validate a conviction already obtained.

We have been unable to find a case in which it has ever been asserted, much less held, that the Government can bolster a criminal judgment of conviction, which has been reversed by a Court of Appeals, by going back into

the trial court and supplementing the record. But such is the maneuver here attempted, and on so palpably weak an evidentiary showing that it would be treated with derision were it not advanced in the highest court in the land by counsel occupying distinguished offices.

Strictly speaking, the prosecutors are not endeavoring to place the defendants in double jeopardy. They are attempting something which to us seems worse—they wish to hang on to the original jury verdicts of guilty while trying to patch up the suppression hearing; they are not willing to place the Government in jeopardy of a new trial. A tactic more oppressive and less consonant with the concept that the sovereign may not seek a second "go" at a citizen in criminal proceedings is difficult to imagine.

Even in the notorious prosecution of *Fries* under the Alien and Sedition Act, Fed. Cas. No. 5126, it was conceded that the Government could not have a new trial, on good or bad grounds, in a criminal case. But here it is contended that this Court, out of hand, may modify the Court of Appeals mandate to the point of virtual reversal, and permit the prosecution to go back to the trial court for the avowed purpose of putting in more evidence to support the conviction already reached in that court. If such procedure be permitted, citizens could be partially retried endlessly until ultimately exhausted or convicted, guilty or innocent.

Rule 33 of the Rules of Criminal Procedure restates the basic proposition, sacred to our law, that only the defendant may move for a new trial. It says:

> "The court may grant a new trial to a *defendant* if required in the interests of justice."

There is no rule, or practice, permitting the prosecution to move for a new trial, or a partial new trial, save action

in the nature of a confession of error (Cf. *Mesarosh v. United States*, No. 20 this term).

Observe that what is really involved is a ruling by the trial court, after a hearing on legal and factual issues, as to the admissibility of evidence, viz., the prosecution contended it could introduce voluminous material which it had procured through a promise of immunity. It still so contends. The issue is much the same as would arise in a murder trial if the defendant contended that a purported confession had been obtained by coercion. In both instances there is a hearing before the court as to whether the evidence is admissible. Under Rule 41(e) this normally is prior to empaneling of the jury, although it may be had thereafter if the cause is not earlier known.

If it be supposed that this was a murder case instead of an income tax case; that the trial court after hearing evidence, had admitted a supposed confession of murder; and that the Court of Appeals had reversed on the ground that the confession was unconstitutionally obtained, we think the notion that the prosecutor could go into the Supreme Court and ask for a new trial as to the admissibility of the confession because he had new evidence that the confession was not obtained by coercion, would instantly be rejected.

This case is no different simply because it is an income tax, rather than a murder prosecution. The prosecution is here seeking a second chance to convict defendants after failing in its first attempt. Or, more accurately, it is seeking a second chance to try suppression issues which are essential to the validity of the merits portion of the trial. Although this effort to assail defendants a second time is casually presented as a "motion to remand" it is essentially a motion for a partial new trial.

It may be doubted that such iniquitous procedure would

ever be presented in the more ordinary fields of criminal law. The reason that the Solicitor General's motion cites no authority would seem to be that the recorded judicial history of the country fails to show any such prior attempt. This is not a proceeding to determine, or to collect taxes. This is a criminal case in which the liberty of citizens is at stake. Zealousness in the collection of taxes may be commendable; overzealousness in criminal prosecution which reduces it to persecution is deplorable.

II.

A new trial cannot be given merely because additional evidence "might conceivably alter" the results.

When Internal Revenue a year ago induced the Solicitor General to seek delay in this Court it was on the ground that it had new evidence which was "in direct conflict" with the original testimony of Busby, Cain and Sauber which "*was false in material and vital aspects*" (Letter of Chief Counsel of Internal Revenue to H. Brian Holland, December 1, 1955, submitted with Solicitor Sobeloff's letter of December 5, 1955 to the Clerk of this Court). This was tantamount to a charge of perjury. Our letter of December 9, 1955 to the Clerk denied this assertion and no evidence "in direct conflict" is now tendered.

When the Solicitor wrote to the Court on June 1, 1956, requesting further delay, the charge had been modified:

> "* * * the additional evidence developed by the Internal Revenue Service suggested *the possibility that there might have been* perjured testimony * * *."

Our answering letter contested this.

Now the amended Motion to Remand (p. 5) asserts only that

> "* * * had the evidence now available been submitted

to the lower courts *the rulings under review might conceivably have been altered* * * *."

It is apparent that Internal Revenue Service has placed the Solicitor General in steady retrogression. A year ago Internal Revenue was claiming perjury. But after an additional exhaustive investigation, grand jury and otherwise, *there has been no recantation of testimony and there is no claim of perjury.*

It nearly always is possible to assert that a modicum of additional evidence, pro or con, might "conceivably have altered" a prior result, or, as really is the claim here, have furnished an additional argument for the same result in the trial court. Indeed new trials on essentially the same evidence frequently lead to different results. But by none of the established rules is such a possibility recognized as grounds for a new or further hearing. If such were the law, there would never be an end to litigation. Many cases might be cited, but the applicable rules and authorities are well summarized in *U. S.* v. *Johnson*, 142 F. 2d 588 (C. A. 7),[6] in which Judge Minton reviewed many cases and said (p. 592):

> "Having decided that there was no recantation or false swearing by Goldstein, the District Court then considered the case as any other motion for a new trial on newly discovered evidence would be considered. On such consideration, the court found that the rule for such motions 'has never been better nor more succinctly stated than' in *Berry* v. *State of Georgia*, 10 Ga. 511, which he quoted as follows:
>
> "'Upon the following points there seems to be a pretty general concurrence of authority, viz: that it

6. The *Johnson* case had a long history in which there were at least two unsuccessful efforts by the defendant to obtain a new trial. The matter was finally closed by this court's opinion in 327 U. S. 106. This court approved the rules we quote in the text.

is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy The Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.:—speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.'

"This is the general rule applicable where there has been no showing of recantation or false swearing and the effect of the newly discovered evidence is considered in its relation to a possible new trial. This rule has been followed in the Federal cases and is of almost universal application among the States. *Johnson* v. *United States*, 10 Cir., 32 F. 2d 127, 130; *Kithcart* v. *Metropolitan Life Ins. Co.*, 8 Cir., 119 F. 2d 497, 500; *Weiss* v. *United States*, 5 Cir., 122 F. 2d 675, 691; *Evans* v. *United States*, 10 Cir., 122 F. 2d 461, 469; *Wagner* v. *United States*, 9 Cir., 118 F. 2d 801, 802; *Prisament* v. *United States*, 5 Cir., 96 F. 2d 865, 866; 23 Corpus Juris Secundum, Criminal Law, § 1461; 39 American Jurisprudence, § 165. In the application of this rule, the District Court considered whether the so-called newly discovered evidence was cumulative, whether it was diligently obtained and presented, and whether some of it was merely impeaching. The court found that much of the evidence was subject to one or the other of these infirmities and that on the whole it did not meet the standards of newly discovered evidence warranting a new trial. In this we cannot say, as a matter of law, that the trial court erred."

Legally, as we show under our next point, the additional evidence could not change the result—the disclosure was timely regardless of whether made in January or July

1948, or at some intermediate date. Moreover the timeliness of the disclosure appears in bold relief from the fact no independent initiation of investigation ever did occur—when agents from Internal Revenue's Intelligence unit possibly might have been preparing to initiate an investigation they found that agents from the Audit Section already were busy verifying or checking on the disclosure. A further hearing might supply minor bits of evidence but it could not alter those essential facts that are fatal to any contention that this disclosure was untimely. And when the Motion is examined closely it will be seen that the Solicitor General does not assert that the additional evidence will, or should, or probably should, lead to an "altered result," merely that it *conceivably* could do so. As much could be said in any case.

III.

The legal theory of the motion, viz., that the "timeliness" date under the voluntary disclosure policy was fixed by date of receipt of an asserted clue or "scent" which ultimately might or would lead to an investigation, was conceded to be erroneous in the District Court and was not presented to, or passed upon, by the Court of Appeals.

Counsel have made a drastic but unannounced, and perhaps unrealized, shift in legal theory that is partially explained in our footnote 3. The motion is presented as dependent solely upon assertedly new facts—actually it is based upon a new and erroneous legal theory applied to old facts which theory was expressly disavowed by the Government in the trial court and never heard of in the Court of Appeals.

It well may be that with a four year lapse of time and with changes of Government counsel, the present brief

writers have overlooked what occurred at the suppression hearing; but the record is clear, not only that their present theory as to when the timeliness date fell (and would bar a subsequent disclosure) is erroneous, but that is not open to them. Counsel also may not be familiar with the detail of the record which indisputably shows that Intelligence did not get a "scent" on June 21, 1948. (See our footnote 3.)

Unless the new legal theory is sound, and may now be asserted, the entire motion is pointless—the prosecutors ask that the case go back so that they may attempt to prove that the disclosure was made in July, 1948 rather than in January-March, 1948. But that is immaterial if a disclosure in July would still have been "timely." Even if the Intelligence Agents had gotten a clue or "scent" on June 21, 1948, and even if defendants had thought such "scent" might lead to investigation, there was no "initiation" of an investigation that would have prevented a valid subsequent disclosure. The Treasury had announced:

> "Now we have said that in order to be considered voluntary, a disclosure must be made before we have initiated an investigation in the case. Therefore, it is essential that we define 'the initiation of investigation.'
>
> "*The mere record of a name does not mean that an investigation has been initiated.* The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure merely because we have a name would be comparable to regarding the telephone book as a dossier of tax evaders.
>
> "*An investigation is initiated when a special agent, an internal revenue agent, a deputy collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.*
>
> "The time of disclosure and the time an investiga-

tion begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecting both the Government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard.

"*We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he 'gets religion' before we have done anything, he will not be prosecuted.*" (Treasury release of May 14, 1947, consisting of address, "Tax Frauds and Voluntary Disclosure," by Chief Counsel of the Bureau of Internal Revenue, J. P. Wenchel, R. 3132, 3136.)

The foregoing definition of "initiation of investigation" became known as the "Wenchel doctrine" or "Wenchel objective test," was so referred to at the suppression hearing herein (R. 378, 433, 441), AND WAS CONCEDED TO BE CONTROLLING BY THE GOVERNMENT (R. 441, 445). THAT CONCESSION, AND IT WAS A CORRECT ONE, STILL STANDS. Getting a clue or a "scent" as to Shotwell, at any time while investigating Lubben, obviously would not be the "initiation of investigation" of Shotwell under any construction of the Wenchel doctrine.

Shortly after the widespread release of the quoted Wenchel speech, Treasury Secretary Snyder made a further release on May 25, 1947, in which he said (portion in parentheses and emphasis ours):

"Prior to such action (initiation of investigation as defined in the Wenchel speech) within the Bureau, a taxpayer may make a voluntary disclosure and escape criminal prosecution *even though his name may appear in an inactive file of suspects.*" (R. 3141.)

It is crystal clear that the Treasury's own definition of "initiation of investigation," precluded treating the mere obtaining of a clue or "scent" as to a possible violator as the initiation of investigation which would bar a subsequent disclosure. Even if persons within the Treasury had Shotwell on a list of suspects as to whom it had a "scent," Shotwell and its officers were still free to accept the Treasury's offers for the making of a voluntary disclosure until such time as investigation was actually initiated.

The original prosecutor recognized that merely obtaining a clue or "scent" would not constitute "initiation of investigation" within the meaning of the disclosure policy. At the suppression hearing there was incidental evidence which showed that supposedly in March 1948 the New York agents who were investigating Lubben obtained information which gave a clue to Shotwell. Prosecutor Edward J. Ryan admitted that this evidence did not tend to prove the "initiation of investigation" or to establish a so-called "timeliness date". He said:

> "* * * The Government did not offer evidence of this statement that Mr. Toohig received from an informant for the purpose of indicating that the express activity in New York represented a commencement of the investigation in this case for the reason that that appears to be preexcluded by the Wenchel doctrine. That was offered for the purpose of demonstrating that eventually in spite of this disclosure the Government was going to be examining these corporate books and records. That was the purpose for offering it. That is the reason it was never implemented with anything else, and there was never any contention made it was transmitted to Chicago at all. There was no such action with respect to it before this alleged disclosure such as would satisfy the Wenchel doctrine. The purpose of the Wenchel doctrine is very apparent. It was to establish an objective test, an objective break-off

> point that wouldn't be affected by what the taxpayer knew or what his motives were, but just a time when after which there could be no disclosure, so that it would eliminate those arguments.
>
> "That certainly must be apparent from its very language." (R. 441.)

With respect to the variations in the testimony as to the dates of disclosure events in January, February and March 1948, the Government, pinning its case on a believed "timeliness date" of December 16, 1947 (which date has long since been abandoned), held that these differences were immaterial, or certainly of no serious consequence. Prosecutor Ryan said:

> "When I mention the dates of the alleged disclosure, I want to say that I don't think it makes any difference whether it was January, February or March. I think those dates are after December 16th, and apparently nobody here made any record of when it was." (R. 445.)

In sum, we find that the prosecutors are now asserting a legal theory, viz., that the obtaining of a clue constituted "initiation of investigation", which is squarely contrary to the official Treasury pronouncements on the subject and was expressly disavowed in the trial court. The fact that the disavowal was as to the asserted March 1948 clue rather than one that is now mistakenly asserted as of June 21, 1948, does not alter the fact that the whole clue or "scent" theory was disavowed by the Government and was admitted to be "preexcluded" by the Wenchel doctrine.

We submit that it is not properly open to the present prosecutors to advance a legal theory which the Government not only did not advance, but denied, below (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380; *Forged Steel Sales Co.* v. *Lewellyn*, 251 U. S. 502, 515). Additionally, it does not lie in the mouth of the prosecution at this

remote state in the proceedings to complain of lack of specificity as to some of the events connected with the disclosure and the compilation of figures, when it took the position in the trial court that pinpointing of such dates and sequence of events made no difference. Defendants in criminal cases should not be continuously harassed with new theories, be they good or bad.

IV.

The evidence is not new.

Under Point 4 of our "Summary of Reasons" we have shown that the principal facts on which the Motion is hinged, *i. e.*, the telephone call of June 21, 1948, and the fact that the summary sheets were not prepared until July 1948, were clear at the suppression hearing and the hearing on the merits.

In addition to these items, Inspector Yaden's affidavit of December 1, 1955, says (a) that at a luncheon meeting at the Chicago Atheletic Club sometime between July 21 and July 30, 1948, Cain and Busby had figures of the unreported over-ceiling sales received by Shotwell, which they offered to turn over to Sauber or Group Supervisor Johnson; (b) that the Shotwell personnel which helped put together the final recapitulations in July 1948 did so at the Belden-Stratford Hotel in Chicago; (c) that neither Sauber nor Johnson made any record or contemporaneous memorandum of their meetings with Cain or Busby in 1948. The Russo affidavit adds (d) that Edward T. Urban, an officer of Close & Co., a Chicago candy manufacturer which also had received black market premium money from Lubben, informed Russo that at a luncheon meeting in July 1948 with defendants Huebner and Sullivan, "there was discussed a contemplated purchase by the Shotwell Mfg. Co.,

Close & Co., and others who had received over-ceiling currency payments from Lubben," of Lubben's companies, for the purpose of getting control of, and destroying, the Lubben books.

These allegations and affidavits are interesting for what they do *not* say as much as for what they say:

It is not shown *when* any of these alleged items *first came to the attention of the Government.* The recitals that undisclosed witnesses told Yaden and Russo things in 1955 or 1956 do not negate the fact that the same things were told to other Government investigators in 1952, 1953 or earlier and are no fulfillment of the inflexible rule that it must be shown "That the evidence has come to [movant's] knowledge since the trial." (Cf. *U. S.* v. *Johnson, supra.*)

The omission of such showing is doubly significant because the Yaden affidavit is the same one that was attached to the Solicitor General's letter of December 6, 1955, and was attacked by our letter of December 9, 1955, as displaying nothing of consequence that was new. If the prosecutors could have filed a supplemental affidavit saying that these things were not known to the Treasury or Justice Departments at the time of the suppression hearing, or the hearing on the merits, or the appeal proceedings, we may be sure they would have done so.

Although the motion states that it was "only as a result of the full-scale investigation begun in April 1955 into possible misconduct" by Internal Revenue personnel in Chicago that "this new evidence was discovered" it is apparent that the Solicitor General has permitted himself to overstate the case:

We have seen that the telephone call of June 21, 1948 and the slow process of assembling data for the final recapitulations which were made in July were repeatedly inquired into by well trained, competent Government counsel

of unquestioned integrity at the suppression hearing and the hearing on the merits.

The same is true of the fact that neither Sauber nor Johnson made any contemporaneous memoranda of their meeting or meetings with Cain and Busby. Prosecutor Ryan was well aware of that and, as we have seen, mentioned that fact in arguing the suppression motion (R. 445).

It may be that the Government did not know in 1952 or 1953 that Sauber and Johnson met Busby and Cain for lunch at the Chicago Athletic Club and did not know that the final recapitulation figures were put together in an office which Cain, a real-estate man and part owner of the Belden-Stratford Hotel, maintained and regularly used in that hotel. Or it well may be that it did know. The record does not show and certainly the motion makes no positive showing. We do know that Sauber was cleared of administrative wrongdoing in meeting Busby and Sauber for lunch. But the *places* of these meetings were, and are, immaterial. The places were normal and by no means sinister. Defendants have never attempted to conceal these places. Indeed at the suppression hearing defense counsel asked Sauber if he had any talk with Busby or Cain outside his office and Sauber replied, "I may have. I can't recall any particular time" (R. 302). The matter was not further pursued.

If there was anything wrong about having a meeting in the Chicago Athletic Club or in assembling the top echelon of Shotwell people in Cain's office at the Belden-Stratford we may be sure that in the year since the Yaden affidavit was filed here, and promptly attacked in our reply letter as being inconsequential, some additional or supplemental showing would have been made.

Finally, it is said that Urban of Close Candy Co., which

had received over-ceiling payments from Lubben, had a meeting with defendants Huebner and Sullivan in July 1948 at which there was discussed a proposal for a group of companies that had dealt with Lubben to acquire his company for the purpose of destroying its books. Under our next point we shall show the peculiarities of Mr. Russo's affidavit in this respect, but whatever the Urban conversation may have been, is it new? The failure of the Government to make a showing of when this alleged episode *first* came to its attention is, we believe, no oversight.

We respectfully submit that as a motion for a partial new trial on the ground of newly discovered evidence the instant motion wholly fails to show the essential ingredient of "newness".

As to diligence it may be sufficient to observe that the Stein affidavit discloses that "certainly" as early as "the middle of 1955" a Treasury "suspicion" that the disclosure did not occur in March, 1948, had become "firmly fixed". However, the case remained in the Court of Appeals for more than three months after this and not a word was said to that court. It is a fair assumption that it was decided to gamble on the outcome in that court on the record as it then stood. On December 6, 1955 the Yaden affidavit was presented here and a motion to remand was promised at an early date. It did not come until nearly a year later. This is the precise reverse of diligence.

V.

The motion is not supported by the affidavits of the purported witness.

The motion is supported only by conclusory and hearsay affidavits by prosecuting counsel and by that of a Treasury detective—not a single affidavit of a witness competent to testify to a single fact is attached, whereas the uniform,

strictly applied, and well known rule is that "the affidavit of the witness himself should be produced, or its absence accounted for." (*U. S.* v. *Johnson*, 142 F. 2d 588, *supra.*)

The books abound with cases in which the rule requiring witness affidavits has been enforced against convicted private citizens who sought a new trial. Would it not be a cruel and repulsive system of justice which would excuse the Government, better equipped as it is to conduct investigations and to obtain affidavits, from giving the citizen, when it wants a new trial (assuming *arguendo* it ever may have one), what it demands from him when he prays the same relief?

There are portions of the affidavits of both Yaden and Russo that are utterly unfit for any judicial proceeding involving the liberty of citizens, much less one in the Supreme Court—"* * * witnesses under interrogation by me * * * have given statements * * *." That is the anonymous informer system carried to the nth degree.

On the other hand both the Yaden and Russo affidavits say that Internal Revenue Group Supervisor Johnson gave an affidavit or made a sworn statement, but the document is not attached. Nor is that of Special Agent Sam Krane from whom the Treasury could readily procure an affidavit.

Thus the Court is presented with carefully filtered characterizations of stories by anonymous and concealed informants on the one hand, and on the other, the same kind of argumentative hearsay with respect to witnesses from whom it is indisputable that affidavits could be produced.

Conclusions, arguments and characterizations permeate the affidavits:

Yaden says that the Belden-Stratford meeting in July 1948 was "for the express purpose of preparing the underlying documents from which there could be developed a purported voluntary disclosure", etc. The key words in

that quotation express complex conclusions rather than facts and display a woeful ignorance of what a "voluntary disclosure", was. It was not necessary to "develop figures" from which to make a disclosure—the disclosure was the act of coming forward and identifying oneself as having filed an erroneous return. (See footnote 2 hereof.) The cooperation with the Government in getting an accurate return came afterward and as a consequence of the disclosure. And use of the sweeping and undefined phrase "underlying documents" is inexcusable. The record shows without dispute that the "underlying documents" in this case were shipping tickets, invoices and the like as well as books of account. The documents that admittedly were prepared in July at the Belden-Stratford Hotel were "summaries" or "recapitulations" prepared *from* underlying documents that had been gathered over a period of months.

The Russo affidavit is even worse: In one sweeping sentence (p. 18) Mr. Russo wraps up the whole case:

> "From statements of fact * * * and from facts and circumstances already in the record, it appears that prior to June 21, 1948 when Special Agent Sam Krane * * * requested, among other things, certain records evidencing shipments of merchandise for which no invoices were rendered * * *, no disclosure, voluntary or otherwise, had been made * * *."

This statement assumes that if a disclosure had not been made by June 21, 1948 that one thereafter would be untimely. As we have seen, this is incorrect.

The statement that no disclosure had been made by June 21 is nothing more than Mr. Russo's opinion as to everything in a 3000 page record plus his own secret investigation. Nevertheless it is boldly and unqualifiedly sworn to as a fact and is made in the face of uncontradicted and unrecanted testimony to the contrary.

There is only one statement of fact in the entire sentence and that statement is demonstrably false: Mr. Russo says that on June 21, 1948 Special Agent Krane asked for records "evidencing shipments of merchandise *for which no invoices were rendered*". But the request to Krane to get information from Shotwell is in the record (R. 3158) and so is his report (R. 3161). Instead of seeking evidence as to shipments *without* invoices he went to get *invoices* (and he got them). He was asked to procure

> "#1—All sales invoices to General Confections, Hillsdale, New Jersey, and 40 West 170th Street, New York City * * *
>
> #2—Same to Eatsum Foods, 19 Rector Street, New York City" (and certain warehouse receipts and mortgage papers.) (R. 3159.)

Krane's report (R. 3161) shows he asked for, and got, these documents. There never has been the faintest doubt of these facts. Mr. Russo's statement reverses the truth and shows how unreliable are his summaries of "facts and circumstances". (See footnote 4.) We think the reason for this misstatement, which could hardly be one of oversight, is obvious—a routine call, such as Krane's really was, to check invoices while investigating another taxpayer excites no curiosity, whereas an investigation as to shipments without invoices might excite curiosity and would give greater color to the new and unsound "clue" theory.

Russo next purports to describe "information" and "assertions" he says he received from Urban, an officer of Close and Company, pertaining to a discussion in the first three weeks of July as to a possible purchase of Lubben's company for the purpose of destruction of its records. Russo says this did not relate to the acquisition of Lubben's books for the purpose of accumulating data to be

used in the making of the Shotwell disclosure. This hearsay recital is subject to all of the vices we have heretofore pointed out. It may be observed that while he tries to create a sinister atmosphere Mr. Russo fails to say whether this asserted proposal supposedly emanated from Lubben, from Urban or someone else. In any event, he does not claim (and he would if he possibly could), that any of the defendants here initiated this proposal and he does not claim that anyone did anything about it. Mr. Russo seeks to draw the inference that because Sullivan and Huebner failed to agree to buy Lubben's company so that they could use its books in preparing further figures in pursuance of the disclosure, that no disclosure in fact had been made. The *non sequitur* is obvious.

Finally Russo says that "from Busby's testimony in the record it appears that he and members of his staff compiled the data in Government exhibits 186 and 189A, B, C, D and E (the alleged disclosure documents) from the first of February through the first of June, 1948, or thereabouts. From statements of fact" made to him by anonymous witnesses it "appears that Government exhibits 186 and 189 A, B, C, D and E were compiled during the space of a day or two * * * in late July 1948." This is either a play on the word "compiled" or a deliberate misrepresentation. The specified summary exhibits admittedly were prepared in the space of a short time. The record has always been clear on that point. However, the data that is reflected by them was collected, or "compiled", over a considerable period of time and there has been no dispute about that (R. 2812-7, 2837). Merely because the summary documents were not put together until late July does not tend to prove that the disclosure had not been made much earlier.

We realize that this Court is not the place to argue facts. Nevertheless, we, and the Court, are faced with a motion

which purports to have a factual background. If that background is examined it will be seen that it consists of argumentative and conclusory hearsay and, in some instances, contains demonstrable misstatements. It endeavors to create the appearance of contradiction of prior evidence but it does not contradict. And that fact we believe we are entitled to make clear to the Court.

In any event, examination of these opinion and hearsay affidavits demonstrates the wisdom of the rule the Government always applies to citizens who seek a new trial on the grounds of newly discovered evidence, namely, affidavits or sworn testimony of witnesses competent to testify to the facts must be produced and not the opinions and conclusions of lawyers and detectives, whether they be well or ill-founded. The affidavits of Yaden, Russo and McNelis well could be stricken. Certainly they cannot be given the weight necessary to subject citizens to further criminal proceedings.

VI.

If the motion has any standing at all it is presented to the wrong Court.

We think that the motion is bad on its face and should be denied. However, if a motion of this kind can be made anywhere it should have been made in the Court of Appeals. In the case culminating as *U. S. v. Johnson*, 327 U. S. 106, there were two separate motions for a new trial made while the case was pending in this Court. The procedural steps are briefly outlined in the early paragraphs of 327 U. S. 106 and are more fully stated in 149 F. 2d 31. There as here a motion for a new trial, or a motion to supplement the record with additional information alleged to show that a Government witness had testified falsely, was presented to this Court while a petition for certiorari was pending. This Court refused to entertain the

motion but did agree to withhold consideration of the petition for certiorari until the defendants could apply to the Court of Appeals. Much the same procedure had earlier occurred after this Court's first decision in the *Johnson* case (319 U. S. 503) in which a motion based upon new evidence was presented here pending a petition for rehearing. This Court denied the motion for stay of mandate without prejudice to the consideration of a similar motion by the Court of Appeals. In other words, in each instance the movant was sent to the Court of Appeals to make his prima facie show for a new trial or for the reception of additional evidence. And that Court in each instance decided whether its then outstanding mandate should be modified to permit the reception of additional evidence in the trial court. (Johnson never did obtain a new trial.)

If we are correct in our view that a motion of the kind now made cannot be made anywhere, the motion should be denied unconditionally. On the other hand, if this Court should believe there is some color to the motion it nevertheless should not be granted but be denied conditionally with leave to present it to the Court of Appeals. Granting the motion outright here would result in a direction to the trial court to receive new evidence in the original case and would deprive defendants of their right to test the legal and factual sufficiency of the motion.

CONCLUSION.

When certiorari was sought over a year ago it was on the basis that the case presented a question of law which was "of considerable importance to the revenue, for, although the [voluntary] policy has been abandoned" the Internal Revenue Service asserted that there were then between 60 to 70 pending cases in which a question under the former voluntary disclosure policy either had

been or could be raised (Pet. p. 20). In our Brief in Opposition (p. 14) we questioned whether there were 60 or 70 pending cases presenting a question like the one here and asserted (p. 23) that under this Court's usual doctrines (*Cf. Rice* v. *Sioux City Memorial Park*, 349 U. S. 70) certiorari should not be granted to determine a question no longer of public importance. Examination of the reported cases since that date reveals only one District Court case (*U. S.* v. *Pack*, D. C. Del.) and that case turned on quite different facts. It is, therefore, now apparent, if it was not apparent a year ago, that the petition for certiorari does not show a case warranting review.

The Government waited until the last day before the statute of limitations ran before indicting these defendants in 1952. The matter has been held in this Court for a year longer than is normal. We are now, in late 1956, talking about tax events of 1945 and 1946 and disclosure events of 1948. Such lengthy and leisurely prosecution is punishing and exhausting.

The Shotwell Company has been unable, and so long as the criminal case is pending, will be unable to make any civil settlement of its asserted tax liabilities for any year after 1944. The individual defendants, and a corporation in which the defendant Cain is a principal stockholder, have been unable to make any settlement of tax liabilities asserted against them for numerous years since 1946 and will be unable to do so as long as this case is pending, for the Treasury successfully opposes bringing any of those matters to trial in the Tax Court (See recitals in App. II hereto).

If the motion to remand and the petition for certiorari be denied we believe it is doubtful if this case will ever be retried in the District Court. But if it should be retried, defendants will have an opportunity to establish

their innocence, or in any event to learn where they stand and bring some order out of their chaotic affairs.

On the other hand, if the motion to remand be allowed and further proceedings take place in the District Court, supplementary to, but in support of the present convictions, and if the Government should prevail, the old record will again have to be reviewed by the Court of Appeals, not merely for error in the supposed new hearing, but to dispose of questions not originally passed because, in the light of its disposition of the suppression issue, the Court of Appeals believed it was "unnecessary to express an opinion as to whether the remaining evidence on the trial below did or did not establish defendant's guilt, or to pass upon the other errors relied upon." Such a path would be a long, long one.

We respectfully pray that the motion to remand and the petition for certiorari be denied.

Respectfully submitted,

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents-Cross Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel.

December 21, 1956

APPENDIX I.

Full Administrative Charges Dated December 2, 1955, Against Ernest J. Sauber Insofar as They Relate to This Case. After Hearing No Finding Was Made Against Sauber on These Charges.

Charge III Failure to render honest, fair, and conscientious service in connection with the income tax matters of the Shotwell Manufacturing Company, Incorporated for the years 1944 to 1949, inclusive; and Cain and Culhane, Incorporated, and Byron A. and Sally T. Cain, for the years 1947 to 1949, inclusive. Specifically,

1. On four separate occasions, you fixed the date of the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case, for the years 1944, 1945 and 1946, as occurring in March, 1948, when in fact, the taxpayer did not furnish the Internal Revenue Service any information bearing upon, or relative to, its unreported black market income for the years 1944 to 1946, inclusive, until July, 1948, after the government had uncovered this source of unreported income and had contacted the taxpayer. The four occasions referred to above were (1) in an interview, as Chief Field Deputy, with Internal Revenue Agent Charles Mammel on October 18, 1950; (2) in a memorandum, written as Assistant Collector, to Special Agent Sam Krane, dated October 16, 1951; (3) in sworn testimony, as District Director, at a hearing on the motion to suppress the evidence in the Shotwell case, in the U. S. District Court for the Northern District

of Illinois, Eastern Division, Chicago, Illinois, on November 13, 1952; and (4) in sworn testimony, as District Director, before representatives of the Inspection Service, on July 20, 1955.

2. You, as Chief Field Deputy, failed to make notes, diary entries, or memoranda in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946, prior to October 16, 1951, when you, as Assistant Collector, furnished a memorandum with respect thereto to Special Agent Sam Krane.

3. You, as Chief Field Deputy, failed to refer the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946, to the office of the Internal Revenue Agent in Charge or the Special Agent in Charge, through proper administrative channels.

4. You, as Chief Field Deputy, failed to notify your superiors in the office of the Collector of Internal Revenue of the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

5. You, as Chief Field Deputy, participated in a luncheon meeting with Byron A. Cain, President of the Shotwell Manufacturing Company, Incorporated, and Leon Busby, the company accountant, at their expense, at the Chicago Athletic Club in July, 1948, for the prearranged purpose of discussing The Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946. You failed to make any record or report of this meeting and failed to report this matter to your superiors.

6. You, as Chief Field Deputy, induced Group Supervisor, Ralph R. Johnson, Office of the Internal Revenue Agent in Charge, to attend the luncheon described in the

preceding specification without the knowledge or consent of Johnson's superiors who had official responsibility for the investigation and determination of the tax liability of The Shotwell Manufacturing Company, Incorporated.

7. You, as Chief Field Deputy, withheld information from Internal Revenue Agent Charles Mammel respecting the luncheon meeting when you were questioned by him on October 18, 1950 relative to the various contacts that you had with officials and representatives of the Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

8. You, as Assistant Collector, failed to include information relative to the Chicago Athletic Club luncheon meeting in a memorandum that you prepared on October 16, 1951, at the request of Special Agent Sam Krane, relative to the various contacts that you had with officials and representatives of the Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

9. You, as District Director, authorized the rejection of Internal Revenue Agent Charles Mammel's request for travel authority to Palm Springs, Los Angeles and San Diego, California, to conduct an investigation in those places in connection with the Shotwell Manufacturing Company, Incorporated, and related income tax cases for the years 1944 to 1946, inclusive.

10. You as District Director, ordered the complete removal of Internal Revenue Agent Charles Mammel from the Byron A. and Sally T. Cain, the Cain and Culhane, Incorporated, and the Shotwell Manufacturing Company, Incorporated, income tax cases for the years 1947 to 1949,

inclusive, although Mr. Mammel, from February, 1949, had been the principal revenue agent in charge of the audit features of the Shotwell Manufacturing Company, Incorporated, case for 1944 to 1946, inclusive, and had a most comprehensive knowledge of the facts and circumstances involving the taxpayers. You further forbade the revenue agents assigned thereto to discuss or communicate with Mr. Mammel, thereby depriving the Service and its agents from knowledge and direction available by reason of Mr. Mammel's familiarity with the case.

11. You, as District Director, withheld information from Assistant United States Attorney General Edward J. Ryan of the luncheon meeting when he originally questioned you on October 23, 1952 relative to the various contacts that you had had with officials and representatives of The Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

12. You, as District Director, intimidated Internal Revenue Agent Paul T. Seto during a conference in your office on April 7, 1955 by indignantly charging that Mr. Seto's report was the worst report you had seen or had knowledge of, and that the agent who wrote it was incompetent and not fit to be an employee of the Internal Revenue Service and was a case for a psychiatrist. You further stated that Mr. Seto, in violation of your orders, was consulting and working together with Internal Revenue Agent Charles Mammel, who as stated in specification 10, above, had substantial knowledge of the facts in the case and was in a position to furnish direction and advice to Mr. Seto, in the best interests of the Internal Revenue Service. You further accused Mr. Seto of working for the Inspection Service of the Internal Revenue Serv-

ice instead of the District Director's office. Such statements of intimidation by a superior officer toward an employee under his direction and control, who was attempting to discharge his duties honestly and faithfully, were contrary to the best interests of the Internal Revenue Service and were designed to impede Mr. Seto's investigation of the Byron A. and Sally T. Cain income tax case for the years 1947 to 1949, inclusive. At the conclusion of said conference you issued instructions to the Chief of the Audit Division to detail Revenue Agent Seto to the Office Audit Branch, thus further intimidating Mr. Seto by removing him from his usual assignment of field audit work.

13. On November 23, 1952, as District Director, you testified under oath that you told Special Agent Krane everything you knew about the Shotwell Manufacturing Company, Incorporated case when, in fact, you failed to tell Mr. Krane about the Chicago Athletic Club luncheon described in specification 5, above; and you represented that you were first contacted by Shotwell Manufacturing Company, Incorporated, in March 1948 when, in fact, no attempt was made by the taxpayer to bring to the attention of the Internal Revenue Service its unreported income for the years 1944 to 1946, inclusive, until July 1948.

14. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that the luncheon meeting at the Chicago Athletic Club described in specification 5, above, took place at the time that the returns of The Shotwell Manufacturing Company, Incorporated, were being transferred from Group Supervisor Ralph Johnson to Group Supervisor Raymond Williams, that is, about February of 1949, whereas, in truth and in fact, the said luncheon meeting took place in July of 1948.

15. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that, after receiving a telephone inquiry from a representative of the taxpayer, you called Group Supervisor Johnson to inquire as to the delay, and that Group Supervisor Johnson explained that the failure to initiate an investigation with respect to the tax liabilities of The Shotwell Manufacturing Company, Incorporated, for the years 1944 to 1946, inclusive, was because you erred in identifying the taxpayer as "Shotwell Candy Company." Contrary to this statement, Group Supervisor Johnson contends he never made such explanation to you.

16. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that you had never advised Group Supervisor Ralph Johnson that representatives of The Shotwell Manufacturing Company, Incorporated, had made or were attempting to make a voluntary disclosure. In conflict with this statement, it has been asserted by Group Supervisor Johnson that you did advise him, respecting the tax liability of Shotwell Manufacturing Company, Incorporated, that the taxpayer desired to make a voluntary disclosure.

17. On October 4, 1955, as District Director, you testified before representatives of the Inspection Service that a check for $50.00 drawn payable to you by Cain and Culhane, Incorporated, for a dinner in behalf of a retiring Internal Revenue Service employee, was returned to Byron A. Cain because the dinner was oversubscribed and there were no facilities available to accommodate additional guests. However, when first explaining this transaction to Group Supervisor Ned Klien in May or June, 1955, you stated that after the check had been returned because Mr. Cain found he was unable to attend the dinner, you subsequently received cash or a check in the amount of $50.00 from Mr. Cain.

APPENDIX II.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11861. SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

IN THE MATTER OF THE APRIL 1956 TERM GRAND JURY.

BYRON A. CAIN and SALLY CAIN, ET AL.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 13, 1956.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On July 27, 1956, Byron A. Cain and Sally Cain, John H. Cain as Trustee of Cain Trust No. 1, a partnership, Harold E. Sullivan, Frank J. Huebner, Uptown Federal Savings & Loan Association of Chicago, Homan Mfg. Co., Inc., a corporation, and Cain & Culhane, Inc., a corporation, filed notice of appeal to this court from an order entered by the district court on July 18, 1956, dismissing their verified petition. The court's action was taken upon a motion of the United States of America, which filed no answer to the petition.

Allegations of pertinent facts set forth in said petition which, for the purpose of this proceeding, are accepted as true, are as briefly as possible now set forth.

In 1948 the treasury department began an investigation of Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell)[1] and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers. That investigation was being continued when the petition herein was filed. Shotwell furnished to treasury agents its records and suitable accommodations for the agents at its offices, and expended about $20,000 in making the services of its auditors available to said agents to assist the treasury's investigation, which extended also into the personal affairs of said Cain, Sullivan and Huebner.

Shotwell, Cain, Sullivan and Huebner were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell to the United States of America for the calendar years 1945 and 1946, in violation of 26 U.S.C.A. § 145(b), in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation. In a trial before a jury, defendants were convicted. On July 15, 1955, we reversed the judgment of conviction and remanded the case (*United States* v. *Shotwell Manufacturing Company, et al.*, 225 F. 2d 394), with instructions to sustain a seasonably made motion by the defendants to suppress certain evidence, and to re-try the case.[2]

At the beginning of the year 1954 (after the trial of the criminal case), the treasury department commenced a new and complete audit and investigation of Shotwell's affairs

1. Now known as Homan Mfg. Co., Inc., a corporation and hereinafter referred to as Homan or Shotwell.

2. Petition to the United States Supreme Court for *certiorari* is now pending.

and those of its officers for 1947 and subsequent years. Shotwell furnished space where its records were made available to the treasury agents.

On or about June 9, 1954, the then district director of internal revenue issued a departmental subpoena to Homan "In the Matter of the Tax Liability of Homan Mfg. Co. for the years 1944, 1945 and 1946", calling for all books, documents, work papers, etc., prepared and used at any date by: first, Frank DelMonte, former cost accountant of Shotwell; second, Busby and Oury, certified public accountants working for Shotwell; and third, all persons and organizations, for Shotwell, in connection with sales by said company in said years.

About July 1, 1954, Shotwell (Homan) delivered to treasury agents books and records covering transactions during the 1940's for examination, constituting a van load of papers, all of which were minutely examined by revenue agents, who made copies of those which they considered relevant, and which documents were returned to Shotwell in late 1955.[3]

Sundry records of Shotwell for the years 1947 to 1952 were called for by a subpoena issued by the acting district director about October 6, 1954. However, said records were not delivered by Shotwell because, among other reasons, Shotwell and its officers were advised and informed that said documents had been examined repeatedly by agents of the treasury and could no longer be called for re-examination under the internal revenue code,[4] constituted preparatory analyses of possible evidence to be adduced at the criminal trial and otherwise could not lawfully and constitutionally be subpoenaed.

3. However, the documents thus delivered by Shotwell did not include special compilations made out of the regular course of business by Frank DelMonte and Busby and Oury, as demanded by the June 9, 1954 subpoenas.

4. In their brief herein, petitioners cite 26 U. S. C. A. § 7065(b).

In September and October 1955, other departmental subpoenas were served upon Homan and Byron A. Cain and Sally T. Cain, Cain Trust No. 1, and Cain & Culhane, Inc., calling for production of substantially all of their books, records and documents for the years 1947 to 1952 inclusive, relating to all of their transactions with or concerning the petitioners, or most of them.[5]

On September 15, 1955, the treasury department made a jeopardy assessment and levy against Homan for the years 1944, 1945 and 1946. The district court held the assessment and levy void. The government's appeal from that order is pending in this court.[6]

On September 16, 1955, Cain on behalf of himself, and Cain & Culhane, Inc., Homan, and Uptown Federal Savings and Loan Association of Chicago, wrote to the regional commissioner of the internal revenue service, declining to comply with the subpoenas, and stating his reasons therefor, including the statement that the materials referred to had been produced repeatedly for inspection by the government's examining agents. He averred that any further attempt to force production of such records would constitute unreasonable and unnecessary harassment and persecution, and therefore would con-

5. For example, Cain & Culhane, Inc. was directed to produce: "All accounting books and records including general ledgers, journals, cash books, auxiliary registers and ledgers, together with canceled checks, vouchers, correspondence, invoices and other written data supporting the original entries in said accounting books relating to any and all transactions had with Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain either directly or indirectly, including, but not limited to all books of account relative to reimbursement by Cain & Culhane, Inc. to Byron A. Cain for expenses of any nature, including payments made to Byron A. Cain; Sally T. Cain, John H. Cain, James P. Cain, Mary A. Cain or Patricia A. Cain and payments to others for or in behalf of Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain, or Patricia A. Cain."

6. *Homan Mfg. Co., Inc.* v. *D. J. Luippold, et al.*, No. 11782.

stitute unreasonable searches and seizures in violation of the fourth amendment to the constitution of the United States as well as a denial of due process of law in violation of the fifth amendment to the constitution.

The treasury department has not attempted to enforce compliance with any of said subpoenas.

Prior to February 7, 1956, the treasury department recommended to the department of justice "that a grand jury investigation be undertaken to determine whether criminal proceedings should be initiated against one or more of [Cain & Culhane, Inc., Byron A. Cain and Sally T. Cain] for certain indicated violations of titles 18 and 26 U.S.C." The department of justice acceded and the attorney general appointed as special assistants Vincent P. Russo and Charles A. McNelis to conduct an investigation. Thereupon, at the behest of the treasury department and not *sua sponte*, the April 1956 term grand jury commenced an investigation into the income tax returns and allegedly related matters of several of the petitioners.

On April 10, 1956, Russo and McNelis caused a grand jury *subpoena duces tecum* to be issued directed to Leon J. Busby, an accountant who had done work for petitioners, requiring the production of documents, some of which had theretofore been by this court ordered suppressed in the criminal case. Thereupon Homan, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, by their complaint, asked the district court to quash said Busby subpoena, that Russo and McNelis be enjoined from using any of the material ordered suppressed before the grand jury, and also be enjoined from taking any witness before the grand jury for the purpose of testifying with respect to any part of said material. We affirmed an order of the district court dismissing the complaint. *Homan Mfg. Co., Inc., et al.* v. *Russo*, 233 F. 2d 547.

About July 10, 1956, Russo and McNelis caused grand jury *subpoenas duces tecum* to be issued directed to John H. Cain, Trustee of Cain Trust No. 1, a partnership, Byron A. Cain, Harold E. Sullivan and Gladys Morrill, "as officers of Shotwell Mfg. Co.", Byron A. Cain as President of Cain & Culhane, Inc., Byron A. Cain as President of Uptown Federal Savings & Loan Association of Chicago, and Martin A. Culhane, as a partner of Cain & Culhane, Inc., a partnership existing during the years 1944 and 1945, returnable before the said grand jury on July 20, 1956. These subpoenas called for all records of said partnership and corporations in so far as they in any way touch or concern transactions with or for Byron A. Cain or any member of his family, including Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain; or with Harold E. Sullivan or any member of his family, including Stella M. Sullivan, Harold E. Sullivan, Jr., and Joseph Sullivan; and Frank J. Huebner, or any member of his family, including Lowell A. Huebner, Frank J. Huebner, Jr., Lorraine Huebner Mannebach, from 1944 through 1952.

Said documents would fill between two and three vans.

The July 10, 1956 grand jury subpoenas in large part duplicate and, in important particulars, are *in haec verba* with the treasury's administrative subpoenas of 1954 and 1955.

About July 13, 1956, Busby complied with the April 10, 1956 subpoena by delivery of sundry documents to the grand jury, which, acting under the advice of Russo and McNelis, thereupon turned the subpoenaed documents over to treasury agents for searching, and recessed for a week.

There are pending in the United States Tax Court eight cases involving an asserted tax liability of Shotwell from 1944 through 1952, and asserted liabilities of Byron A.

Cain and Sally Cain and Cain & Culhane, Inc. for divers years, in which cases counsel for the treasury have repeatedly asserted that they are not ready for trial and require additional investigation and preparation.

Petitioners pray that "the grand jury minutes be produced in open court for examination in the premises; that the grand jury be assembled and be interrogated in the premises by the court; that the said assistant attorneys general be admonished or disciplined as to the court may seem meet; that all treasury agents who have received or in any way examined, outside the presence of a quorum of the grand jury duly assembled and in session, any of the documents surrendered under the Busby subpoena be punished for contempt".

The Department of Justice, both through the said Russo and McNelis and otherwise, has repeatedly announced that it is causing said grand jury to investigate as to whether crimes have been committed by petitioners Shotwell, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner. Hence petitioners further pray that, if the court be satisfied that any of the documents surrendered to the grand jury under the said Busby subpoena have been seen or examined by any agents of the grand jury, the jury be instructed that it cannot validly consider any accusations of crime against the said named petitioners or make any inquiries as to them or return any indictments against them to which the said documents or any material in or suggested by them is or are in anyway relevant

They also pray that all of the subpoenas referred to be quashed "because the same constitute aggravated harassment of petitioners, are an unreasonable search and seizure, a violation of due process of law in violation of the several constitutional rights of the several petitioners". Petitioners further pray that the subpoenas be quashed

"because they are but a step in an illegal scheme of the treasury to subvert the grand jury subpoena of this court into a tool for a treasury fishing expedition".

During oral argument in this case, Mr. Russo stated that, in July 1956, following the entry of the order from which the appeal herein was taken, the aforesaid *subpoenas duces tecum* directed to John H. Cain, et al. were obeyed and the records therein called for were turned over to the grand jury which caused the same to be examined as were the other records procured by prior subpoenas. That examination still continues.

Petitioners charge misuse of the powers of the grand jury. They contend that thereby their constitutional rights under the fourth and fifth amendments of the constitution of the United States are being and will be violated. The fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *."

The fifth amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor be deprived of * * * property, without due process of law; * * *."

They claim that, as a result of said violations, they will suffer injury in two areas; first, in the return of indictments against them and, secondly, in civil proceedings for the collection of federal taxes, with interest and penalties. We shall treat of these two areas separately.

Inasmuch as this appeal pertains to an investigation of documents produced in accordance with grand jury

subpoenas, the status of the grand jury in our jurisprudence is a polestar to guide us. The fifth amendment adopted the grand jury, as it existed at common law, and thereby made it a part of the fundamental law of the United States for the prosecution of crime. No part of the constitution defines the grand jury. No act of congress has ever attempted such a definition.[7] It had its origin in the common law and has existed for many hundred years.

The power of the grand jury is not dependent upon the court but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the prosecutor, its own members or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court. *Cauley* v. *Warren*, 216 F. 2d 74, 76.[8]

7. While Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., adopted under the authority of congress and relating to the grand jury, recognizes the continued existence of the grand jury system in this country, that rule is limited to providing a method for its organization, a manner of returning indictment or no bills, the period for which it serves, provision for relaxation of secrecy by the court, and, by enumeration, a restriction on the persons who may be present during the grand jury's sessions.

8. In *Ex parte Bain*, 121 U.S. 1, 30 L. Ed. 849, 852, the court quoted with approval the language of Justice Field in a charge to a grand jury:

> "The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. * * * the institution was adopted in this country, and is continued from considerations similar to those which give

In *Costello* v. *United States*, 350 U. S. 359, at 361, the court said:

> "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as

to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it come from the government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

> in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor".

While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions it possesses an independence which is unique. Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves. It is unnecessary for us to enunciate general rules as to when a grand jury may so exceed its historic authority as to justify a court in interfering with its investigatorial power. In the case at bar, we are asked to decide only whether the 1956 April term grand jury was acting within its authority in swearing witnesses and then entrusting them with subpoenaed records and documents for the purpose of examination thereof by or under the direction of said witnesses, out of the physical presence of the jury or any member thereof, for the purpose of assisting the grand jury in its deliberations.

While it is true that, at least in a limited sense, the testimony before a grand jury of witnesses who, pursuant to its direction, have examined voluminous records and documents and testify as to what they have found therein, is hearsay evidence, that fact would not make it improper for the grand jury to consider it.[9]

9. In *Costello* v. *United States*, *supra*, at 362, the court said:

> "* * * As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . .' *United States* v. *Reed*, 27 Fed. Cas. 727, 738.
>
> "* * * If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evi-

1. In view of the independence of the grand jury and its traditional functions, on the showing made it would be incongruous for the district court to require the grand jury to produce its minutes in open court for examination, to assemble and interrogate it or the members thereof, to admonish or discipline the assistant attorneys general assigned to the grand jury, to instruct the jury that it cannot validly consider any accusations of crime against petitioners, make any inquiries as to them, return any indictments against them, to which the documents in question are relevant, or that the court should quash the grand jury subpoenas because, it is claimed, they are but a step in an illegal scheme to subvert the grand jury subpoena into a tool for a treasury fishing expedition. On the facts appearing in the petition alone, it would be unwarranted for the court to punish for contempt treasury agents merely because they have received or examined,

dence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. . . .

"Petitioner urges that this court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in an interminable delay but add nothing to the assurance of a fair trial."

outside the presence of a quorum of the grand jury assembled and in session, any of the documents surrendered to the grand jury in response to its subpoenas, and it would also be unwarranted for the court to quash all of the subpoenas on the ground of the constitutional violations charged. Any such actions by the district court would be gratuitous.

What we have just said should not be construed as precluding the right of the district court, to which indictments against the petitioners may be returned, from considering, if and when properly raised there, the contentions of the petitioners that their constitutional rights, herein relied on, were violated in the processes culminating in said indictments. Of course, we express no opinion as to how the district court should then rule. While we hold that the grand jury's actions under the circumstances are immune from interference by the court, we feel that any indictments which it votes, when they reach the court, carry no immunity from the application of the court's established criminal procedure.

2. In this country, as in England of old, the grand jury acts in secret. *Costello* v. *United States*, supra, at 362. Grand jury proceedings are traditionally secret. *United States* v. *Rose*, 215 F. 2d 617, 628. From earliest times it has been the policy of the law to shield the proceedings of grand juries from public scrutiny. Courts and text writers have advanced various reasons for this rule of secrecy. For a comprehensive review of this matter see *Goodman* v. *United States*, 108 F. 2d 516, 519, 127 A. L. R. 265 and the annotation at 272. See also, *Reichert* v. *Commissioner of Internal Revenue*, 214 F. 2d 19, 22.[10]

10. In the *Reichert* case, in speaking of a state statute dealing with grand juries, we quoted the reasons for secrecy as stated in *Schmidt* v. *U.S.*, 115 F. 2d 394, at 396, by way of quotation from *U.S.* v. *Amazon Industrial Corp.*, 55 F. 2d 254, 261:

"'(1) To prevent the escape of those whose indictment

The uncontradicted facts in this case in themselves point to an additional reason. The government had by various administrative subpoenas endeavored to gain access to the documents and records referred to in the petition. Having failed in that effort, government counsel made no effort to compel compliance with said subpoenas. Evidently they abandoned all civil procedures available to them. Instead they resorted to grand jury subpoenas and thereby brought those documents and records before the grand jury. With the consent of the grand jury this material has been turned over to treasury agents, who, with their assistants, have been examining it. If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The fifth amendment's adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the

---

may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury."

perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings.

Moreover, the public has an interest in maintaining the secrecy of the grand jury. This is because the grand jury is the direct, independent representative of the people as a whole rather than those brought before it. The application of secrecy to its proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. Otherwise such misuse of the grand jury's time and functions might in a substantial degree interfere with its investigation of crime and the return of indictments and no bills.

We are aware that it has been held that, if, after an indictment has been found and made public and the defendant has been apprehended, *Metzler* v. *United States*, 64 F. 2d 203, 206, and the grand jury discharged, *Atwell* v. *United States*, 162 Fed. 97, 101, a disclosure becomes essential to the attainment of justice and the vindication of the truth, the rule of secrecy may be relaxed in the discretion of the court. This responsibility should reside in the court, of which the grand jury is a part and under the general instructions of which, it conducts its "judicial inquiry". *Schmidt* v. *United States*, 115 F. 2d 394, 397. But, in the cases just cited, the purposes for relaxation of secrecy were fundamentally different from the government's purpose in searching for evidence, in the case before us. Therefore, in the situation presented to us in the case at bar, we hold that the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by

or through an examination of records and documents made under the authority of the grand jury.

It is significant that the government's counsel, in their brief herein, first, do not challenge the proposition that a grand jury subpoena cannot be used for the purpose of obtaining evidence to be used in a civil proceeding; and secondly, do not disclaim an intention to use, in civil proceedings, information gleaned from examination of the records and documents subpoenaed by the grand jury in this case.

We said in *Homan Mfg. Co., et al.* v. *Russo, et al.*, 233 F. 2d 547, that the proceedings of the grand jury are secret but that we had no right to presume that the grand jury would permit records covered by its subpoenas to be diverted to the use of third persons, or that defendants propose or intend such diversion. We added that such a proposed use, if attempted, would invoke the protective power of the district court, which could act either contemporaneously or afterward in connection with such attempt. The admitted facts now before us show that there is a need for the exercise of the protective power of the district court.

3. While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as

tax collection or otherwise. The right to freedom from interference by the court, which the grand jury enjoys, does not extend to such treasury agents or other third persons, including those who work with, under, or superior to said treasury agents. The direct or indirect use of any of the records and documents in question, or any information gained therefrom, in any civil proceeding can be prevented if objection is timely made therein. Moreover, the protective power of the district court should now be used to restrain any of such persons from in any manner violating the secrecy which enveloped these records and documents when the grand jury turned them over for examination. Such a restraining order should, of course, be in such detail and directed to such persons as to make it capable of effective enforcement. Thus, these are some of the ways in which the courts can and should implement the constitutional guarantees upon which the petitioners here rely. While, *in a criminal prosecution* based upon indictments of these petitioners (if they are indicted) they will be required to await the return of said indictments before having a hearing in the trial court on their contentions that their constitutional rights were violated, we think it is now apparent that, as far as *civil proceedings* are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under the hereinbefore quoted provisions of the fourth and fifth amendments.

For the reasons herein set forth, the order from which this appeal was taken, is reversed and this cause is remanded to the district court for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HOMAN MFG. CO., INC., a corporation,	*Plaintiff,*	Civil Action No. 55 C 1541
vs.		
D. J. LUIPPOLD, *et al.*,	*Defendants.*	

FINDINGS OF FACT.

The Court finds the following as facts established by the evidentiary material presented to it on the motions for summary judgment herein and that there is no genuine issue as to the same:

1. The Court has jurisdiction of the parties and the subject matter.

2. Homan Mfg. Co., Inc., plaintiff herein, was formerly known as "The Shotwell Manufacturing Co." It is one of the defendants in a certain criminal income tax case, entitled *United States of America* v. *The Shotwell Manufacturing Company, et al.*, cause No. 52 CR 143 on the dockets of this Court, hereafter in these findings and conclusions sometimes referred to as "the criminal case."

3. The criminal case was commenced by the filing of an indictment on March 14, 1952, alleging that the net income of The Shotwell Manufacturing Company was understated in its tax returns for the calendar years 1945 and 1946 in the sum of $490,719.52, resulting in a tax deficiency of $286,607.79. Upon the trial of the criminal case, Charles J. Mammel, Revenue Agent, testified that upon the basis of all the evidence in that case the understatement of income for the years 1945 and 1946 was $453,872.40.

4. On February 7, 1949 Charles J. Mammel was assigned as Revenue Agent to investigate Federal income tax returns of the plaintiff for the years 1944, 1945 and 1946, and has worked on an investigation of the plaintiff's tax returns for the said three years, and possibly others, to the exclusion of everything else from that time to this. At various times he has had as many as nine other Revenue Agents or employees of the Internal Revenue Service working under him and assisting him in his work.

5. On, and for some time prior to, September 15, 1955, all of the assets of the plaintiff (except a small amount of office furniture and records and an automobile) consisted of cash in checking accounts in Chicago banks or in deposits or shares in sundry Federal Savings and Loan associations, and amounted to approximately $1,114,000. Said assets had been held in such form for some considerable time and plaintiff did not intend to secrete or hide them.

6. On September 15, 1955, the Internal Revenue Service issued and served a jeopardy levy against the plaintiff and against all of the financial institutions in which its funds were lodged asserting that the total sum of $3,172,123.65 was then due and owing the United States from the plaintiff for additional income and excess profits taxes,

penalties and interest for the years 1944, 1945 and 1946, beyond those reported and paid by plaintiff. The said levy asserted that of the foregoing sum $755,190.98 was due for taxes for the year 1945, exclusive of penalties and interest, and $281,029.72 was due for taxes for the year 1946, exclusive of penalties and interest. The total amount of taxes and penalties asserted by the said assessment was $2,306,900.05. On or about November 14, 1955, the Internal Revenue Service issued a notice of determination of income tax liability for the said three years in which it asserted deficiencies of $2,122,944.94 for alleged taxes and penalties. The difference (excluding interest) between the amount of the jeopardy assessment of September 15, 1955 and the determination of November 14, 1955 came from a recomputation of tax rates and correction of mathematical errors and not from any substantial change in asserted income forming the base for the tax.

7. The said assessment and determination were based on the work and conclusions of Charles J. Mammel, and with insubstantial deviations represent his determinations of taxable income, notwithstanding the assessment itself is signed in the name of another person.

8. The assessment in question is patently arbitrary, capricious and wholly void.

9. In making his determinations of taxable net income Mammel made no attempt to be fair to the taxpayer at any time; he proceeded on the assumption that he was only required to be fair to the taxpayer "if I can" and did not adhere even to that standard.

10. The alleged additional income determined by Mammel consists principally of (a) alleged over-ceiling cash "premiums," paid by one Lubben which asserted payments were the subject matter of the criminal case; (b) approximately $964,000 gross income which it is asserted should

have resulted from extra manufacture of candy which Mammel believes should have occurred but which is not reflected on the records of the company; and (c) disallowance of sundry items of expense. In determining item (a) above Mammel both relied upon, and misconstrued, items of evidence ordered suppressed in the criminal case, relied upon altered and changed purported records of said Lubben, wholly failed to make any good faith practical judgment as to offsetting black-market expenditures, and acted essentially upon an informal determination he had made in late 1951 or early 1952 and ignored relevant facts brought to his attention between that time and September 1955 showing that at least part of his initial determination were erroneous. In determining item (b) above Mammel was wholly imaginary and did not even purport to find whether the so-called extra production remained in inventory or was sold and admits that he has no evidence that so much as one pound of this asserted extra 4,000,000 pounds of candy was ever sold or shipped or remained in possession. In determining substantial disallowances comprising item (c) above Mammel failed to follow reasonable procedures to test the verity of plaintiff's claimed deductions but made disallowances by whim and caprice on the excuse that he "didn't have time" between 1949 and 1955 to investigate. The arbitrary, capricious and unlawful actions in this finding described were carried into and are substantially found in the determination of November 14, 1955.

11. Mammel's determinations were arbitrary, capricious and unlawful in the extreme and it is not necessary to decide whether such actions sprang from malice, incapacity, or a desire to justify the length of time and large amounts of manpower consumed in this investigation, or from a combination of these or other reasons.

Mammel suffered a complete mental breakdown on March 19, 1953 and upon cross-examination in February 1956 was unable to recall basic rules of taxation involved in this case and which should have come into play when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair judgment in making the 1955 assessment.

12. The making of the assessment and jeopardy levy has had the effect of completely tying up, with *de minimis* exceptions, all of the taxpayer's assets. Unless the arbitrary assessment and levy is set aside the taxpayer will be without funds to pay the fees and taxes necessary to maintain its corporate existence. If collection upon the jeopardy levy was permitted, all of the taxpayer's assets would be seized and it would be without funds to engage lawyers, accountants or pay any other expenses necessarily incident to a legal proceeding to recover the unlawful exaction resulting from Mammel's arbitrary and capricious assessment.

13. Special and extraordinary circumstances exist in this case so as to make inapplicable section 7421 of the Internal Revenue Code of 1954 relating to injunctions against the assessment and collection of taxes.

14. The United States has actively participated in and controlled the defense of this litigation.

15. No genuine issue as to any material fact exists in this case.

CONCLUSIONS OF LAW.

1. The jeopardy assessment of September 15, 1955, made against the taxpayer, and all subsequent proceedings based thereon were made unlawfully and in violation of the taxpayer's constitutional rights and hence are wholly null and void.

2. The jeopardy assessment being wholly void and of no legal effect created no lien in favor of the United States and the United States is not a necessary party to this action.

3. Plaintiff is entitled to a permanent injunction against the enforcement of the assessment and levy of September 15, 1955, and any other proceedings or rights that might be claimed by virtue of said assessment and levy or any new assessment based on the present determinations of Charles J. Mammel.

4. Section 7421 of the Internal Revenue Code of 1954 does not prevent the Court from entering an injunction under the circumstances of this case.

5. Defendant's motion for a summary judgment should be denied.

6. Plaintiff's motion for a summary judgment should be granted.

Enter:

JOSEPH SAM PERRY.

Dated June 14th, 1956.